

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:17-CR-208CW
	)	
TERRY CHARLES DIEHL,	)	
	)	
Defendant.	)	

Transcript of Status Hearing

BEFORE THE HONORABLE CLARK WADDOUPS

December 12, 2017

Karen Murakami, CSR, RPR  
8.430 U.S. Courthouse  
351 South West Temple  
Salt Lake City, Utah 84101  
Telephone: 801-328-4800

APPEARANCES OF COUNSEL:

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For the Defendant: SMITH CORRELL LLP  
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1           **Salt Lake City, Utah, Tuesday, December 12, 2017**

2                                   \*   \*   \*

3                   THE COURT:   We are here in the matter of the  
4   United States v. Terry Charles Diehl, case 2:17-cr-208.  
5   Will counsel please state their appearance.

6                   MR. WASHBURN:   Loren Washburn representing  
7   Mr. Diehl.

8                   MR. BENNETT:   Jared Bennett on behalf of the  
9   United States.

10                  THE COURT:   The purpose of this hearing is  
11   basically to discuss how we proceed on Mr. Diehl's  
12   motion in terms of talking about a schedule and the  
13   issues that we ought to anticipate in terms of how we  
14   address that.

15                  Mr. Washburn, we have your motion, are there  
16   any other materials you expect to file before we hear  
17   from the United States?

18                  MR. WASHBURN:   Your Honor, Mr. Bennett and I  
19   discussed that the other day.   I think there are two  
20   additional pieces of information that -- we'll defer to  
21   the court, but that we talked about possibly filing.  
22   One of those is an affidavit from Mr. Diehl regarding  
23   his net worth.   We have an assertion in there that he  
24   had a net worth under \$2 million.   Given the recent  
25   bankruptcy we thought that was pretty solid evidence,

1 but after looking at cases and discussing it with  
2 Mr. Bennett, I think it would be best for us to put an  
3 affidavit to that effect in. But that's something we'll  
4 submit as a supplement.

5           The other thing, and I think here I'd take  
6 the court's direction on this one, as the court may have  
7 seen, I think it's Exhibit T to our motion, was an  
8 affidavit from Mr. Peters where he had collected all the  
9 invoices from all the attorneys and had spelled out a  
10 gross number of hours. That gross number of hours  
11 included both pre and post-Indictment, and it didn't  
12 include billing entries or any other level of  
13 specificity. I think in that declaration we suggested  
14 that we would take the court's lead. If the court wants  
15 a more detailed listing at this point, we're happy to do  
16 that. If on the other hand the court wanted to  
17 bifurcate it and determine whether we were entitled to  
18 fees before we started looking at the reasonableness of  
19 the fees, we're happy to do that as well. Mr. Bennett I  
20 think had suggested that he thought the proper way to  
21 proceed, and I suppose I'm speaking for him, but was for  
22 us to get that more detailed proffer. At this point  
23 we're happy to do that. It will take some looking and  
24 redacting at whether some of these entries may involve  
25 privilege. And I think together with that -- with that

1 specific listing of billing records we'll probably  
2 provide an affidavit from Neil Kaplan. As we mention in  
3 Exhibit T we retained Mr. Kaplan as an expert to advise  
4 the court on -- on advising the court on the necessity  
5 of the various time entries that we've entered. So he's  
6 been undertaking a review of those billing records as  
7 well, and he would provide an explanation to the court,  
8 or provide testimony, whichever the court believes would  
9 be more helpful, on the necessity and the reasonableness  
10 of the hourly expenditures that we've made.

11 THE COURT: Mr. Bennett, what's your view?

12 MR. BENNETT: My view is based on EAJA, to  
13 incorporate EAJA procedures into this litigation. And  
14 what EAJA requires is seven things, and one of those is  
15 detailed billing statements from counsel, because in our  
16 response we're supposed to be able to either take issue  
17 with or go along with whatever those are. And so I  
18 think EAJA is a matter of what's required in the initial  
19 filing, actually requires those detailed billing  
20 statements. And so that's why I think the proper way  
21 would be for Mr. Diehl's team to supplement that with  
22 those detailed billing statements so we could have one  
23 self-contained response that hopefully addresses all of  
24 the issues.

25 As to the expert to kind of opine as to

1 whether those are necessary, I've never seen an EAJA  
2 case in all the ones that I've litigated and all the  
3 ones that I've looked at that's ever considered that  
4 because that would be yet another expense that would be  
5 added onto potentially. We need to decide this  
6 according to EAJA on the record as much as possible. So  
7 I understand the defense's -- or defendant's,  
8 Mr. Diehl's position in this case would be there may be  
9 a need for an expert, there may be a need for discovery.  
10 That may be true, but to the extent possible, it should  
11 be resolved on the record, which is I think hopefully  
12 going to be before the court in short order.

13 THE COURT: It does seem to me that there is  
14 some merit worth discussing as to whether or not we  
15 reach the issue as to the amount of attorneys hours and  
16 the reasonableness of whether it was necessary until we  
17 decide whether the initial hurdles have been crossed.  
18 But if the United States believes that they are required  
19 to file all of that before the United States responds, I  
20 don't have any objection to that.

21 MR. WASHBURN: Neither do we, Your Honor.  
22 We can talk about where in the schedule that may set. I  
23 think Mr. Bennett and I have talked about a schedule  
24 that made sense for us. Of course whether that makes  
25 sense to the court is a different question.

1           THE COURT: Well, I'll hear you out on that.  
2 But there's one other issue that having read the motion  
3 and considered the issues that are going to be placed in  
4 front of the court, one of the issues will be the need  
5 for the court to review the grand jury proceedings in  
6 terms of what presentations were made to the grand jury.  
7 I don't have a motion from Mr. Diehl yet to release the  
8 grand jury proceedings. I don't think they need to be  
9 released publically at this point. I think they can be  
10 released for the court's in camera review. Where are  
11 you on that, Mr. Washburn?

12           MR. WASHBURN: I suppose there are a couple  
13 of different places that could come into play, Your  
14 Honor, and so let me take up I think two different  
15 versions of the grand jury. One, and I think this is  
16 what you're referring to right now, is a request that  
17 the court review -- and we made this general request in  
18 our pleadings, but you're correct, we didn't file a  
19 specific motion under the rule asking for the disclosure  
20 of grand jury materials to the court. Specifically,  
21 that would be something like the presentment of the  
22 Indictment, what the United States Attorney's Office  
23 said by way of instruction to the grand jury, by way of  
24 summation of evidence to the grand jury, perhaps -- it's  
25 been my experience that in most of these instances the

1 record that establishes, or that purports to establish  
2 probable cause before the grand jury usually is a  
3 government agent testifying. So none of that -- we  
4 haven't filed a motion specifically to that point, Your  
5 Honor. There's a second -- and so I think that's what  
6 you're asking. And I suppose since we requested you to  
7 review those documents, under Rule 6(e) -- I forget  
8 exactly the chain because it goes down quite a bit -- I  
9 think that we -- we're happy to file a brief motion  
10 moving that the court order the disclosure of those  
11 pursuant to I think it's 6(e), whatever the number is,  
12 and then capital (E) little (i).

13 THE COURT: Right. Capital (E) small (i).

14 MR. WASHBURN: That was my recollection,  
15 Your Honor. So I suppose we ought to move their -- we  
16 had some discussion of whether -- I think in our  
17 position on the sealing of Mr. Hirata's declaration we  
18 had some discussion of whether that constituted a  
19 motion. It sounds like the court would probably rather  
20 we just have a direct motion --

21 THE COURT: Let me ask Mr. Bennett. Does  
22 the United States intend to oppose such a motion?

23 MR. BENNETT: No. If -- I think -- the  
24 statute standard is good cause. And in this case I  
25 think there is good cause for the court to order and for



1 the United States to produce the matters occurring  
2 before the grand jury. To that effect, Your Honor,  
3 since I wasn't a prosecutor in this case, I'm taking  
4 this as sort of a civil matter, I was wondering if the  
5 court would grant an oral motion to allow me to review  
6 the 6(e) -- the matters occurring before the grand jury  
7 so that I --

8 THE COURT: Yes, absolutely. I believe  
9 that's appropriate.

10 Why don't we see if we can shortcut this. I  
11 don't need any more paper, unless you'd just like to  
12 chop down another tree. But I'm going to treat  
13 Mr. Washburn's statement as an appropriate motion under  
14 Rule 6(e) to release the grand jury proceedings to the  
15 court, not to the public, and take the United States'  
16 position as not opposing that motion, and we will enter  
17 an order to that effect. And Mr. Bennett, of course,  
18 will be allowed to review those. And subject to that  
19 review, if there's some part of that that you believe  
20 should not be released to the court you can raise an  
21 objection at that point. And I think I will need all of  
22 the grand jury -- there were several grand jury  
23 proceedings in this case. I think I will need the  
24 transcripts for each one of the grand jury proceedings.

25 So with those ideas in mind, what's the

1 schedule you're proposing?

2 MR. BENNETT: Mr. Washburn and I, as he  
3 mentioned, have had a few discussions on this. What  
4 we've initially proposed is that the United States'  
5 response memorandum would be due on January 31st as to  
6 the substantive issues in the motion.

7 There was something I think that  
8 Mr. Washburn alluded to just a moment ago regarding  
9 any -- to see whether Mr. Hirata's declaration should be  
10 sealed. And we had discussed the date of December 29th  
11 for the United States to respond to whether that should  
12 remain under seal or whether it matters at all. But  
13 having just received this, this is something that we're  
14 just trying to initially go through. And I believe that  
15 we had agreed that on February 28th, at least  
16 preliminarily, would be the due date for the reply  
17 memorandum from Mr. Diehl. Now, that may be -- if  
18 there's something along those lines that we find that  
19 they need more time, I would absolutely be willing to  
20 grant Mr. Washburn extra time. I think --

21 THE COURT: What would be a reasonable date  
22 to set for production of the grand jury transcripts?

23 MR. BENNETT: Those are -- I think we have  
24 those ready to go, and so I think a week from today  
25 would probably be ample. If I'm wrong, I will let the

1 court know, but I'm fairly certain we should be able to  
2 produce them by then.

3 THE COURT: Say the 20th of December.

4 MR. WASHBURN: And, Your Honor, just a point  
5 of clarification because you ordered that the grand jury  
6 transcripts would be produced to the court and not the  
7 public, I assumed, although -- I assume that's not to  
8 me.

9 THE COURT: No. They need to go to you as  
10 well.

11 MR. WASHBURN: Okay. Thank you.

12 THE COURT: Yes.

13 MR. BENNETT: Okay. My understanding was  
14 that the only thing was allowed is to go to the court  
15 and not to counsel because these are ex parte. That's  
16 what the statute says, ex parte to the court. I have  
17 yet to see -- maybe there is out there, but none of the  
18 cases I've read would allow those to go to counsel yet.  
19 It's always been in camera review ex parte for the  
20 court.

21 MR. WASHBURN: I think, Your Honor -- I  
22 think what Mr. Bennett is referencing there -- and there  
23 are two different statutory regimes that we could  
24 potentially be working under. One is under EAJA. And  
25 if you look at the discovery provision under EAJA, it

1 does talk about production of classified materials and  
2 other things, including matters occurring before the  
3 grand jury, and directs that those matters would be  
4 presented and kept in camera and kept under seal. Now,  
5 I haven't looked at -- frankly, the Hyde Amendment  
6 cases, Your Honor, are so few and far between that  
7 there's not a very well developed juris prudence.

8           A second statutory regime, since we are  
9 talking about matters occurring before the grand jury,  
10 Rule 6(e) itself provides a mechanism upon the request  
11 of the defendant, which I think we just had here, for  
12 the court to order the disclosure of any grand jury  
13 materials that are -- and I'm going to lose the exact  
14 phrase from the statute, Your Honor, but something like  
15 preliminary to or in association with litigation. And  
16 under Rule 6(e) you see a number of cases where, for  
17 example, the court gets a request from a private  
18 litigant to have something disclosed in the context of  
19 say an IRS audit, or something along those lines, and  
20 the court considers that and discloses those materials  
21 to the defendant under Rule 6(e). So I think Rule 6(e)  
22 has a mechanism where the court could order it  
23 disclosed.

24           Although, I agree with Mr. Bennett that if  
25 he's just talking about the Hyde Amendment, there is

1    this discussion of -- and it's 3006(a), I believe. But  
2    so I think the court could order it, could order the  
3    disclosure of matters occurring before the grand jury  
4    and that those be produced to us. I think if we were  
5    dealing with one of the other categories under the Hyde  
6    Amendment, such as classified materials or the like,  
7    then I don't think the court would have the ability  
8    because there wouldn't be a separate statutory or  
9    rule-based regime for the court to rely on in ordering  
10   the disclosure.

11                   THE COURT: I think the question is whether  
12   or not they should be disclosed to the public is one we  
13   don't have to resolve at this point. There may come a  
14   time in which the court concludes, or the parties  
15   conclude that the grand jury materials should be  
16   disclosed to the public, but we're not at that stage  
17   yet. But I do believe that in order for Mr. Diehl to be  
18   able to argue the basis for his Hyde Amendment motion,  
19   Mr. Washburn needs to see what was presented to the  
20   grand jury because part of the basis of his argument is  
21   that there was misrepresentations to the grand jury, or  
22   failure to disclose relevant information to the grand  
23   jury. I don't know how he can make that argument to the  
24   court without seeing what was said to the grand jury.

25                   MR. BENNETT: May I make a proffer on that?

1 THE COURT: Sure.

2 MR. BENNETT: This isn't atypical. We run  
3 into this situation, for example, in freedom of  
4 information act cases. What we do there is produce a  
5 Vaughn Index where the court can have in camera review  
6 of the things the United States has billed and the  
7 opposing party to the FOIA motion is able to say, well,  
8 based on this, we don't think these exemptions apply  
9 because of this reason. We would produce an index as  
10 opposed to actually producing the material because the  
11 way -- at least what I've seen in the Hyde Amendment is  
12 that because it specifically applies in this situation,  
13 my understanding is what it says is it's only ex parte  
14 in camera review for the court, not for disclosure to  
15 the parties even. I think *Gardner*, the case out of the  
16 Western District of Oklahoma, was then Judge Holmes,  
17 talks about that standard fairly thoroughly.

18 But that's why I think at this point in time  
19 what I would propose is we can produce some sort of a  
20 privilege index or something to that effect that would  
21 at least provide notice to Mr. Washburn to be able to  
22 make an argument without disclosing the material under  
23 6(e). I think it harmonizes the statute better.

24 THE COURT: Let's proceed in this manner:  
25 Let's have the United States produce the transcripts to

1 the court on December 20th. Produce the appropriate  
2 index that you've described with a list of privileged  
3 material. Mr. Washburn at that point can move the court  
4 for disclosure to himself and the United States can  
5 determine if they're going to oppose that. Does that  
6 make sense?

7 MR. BENNETT: Yes, Your Honor.

8 MR. WASHBURN: It does, Your Honor. And  
9 perhaps that time of year's going to be a little bit  
10 odd, but we had -- we had discussed and I think  
11 Mr. Bennett had mentioned that he was contemplating a  
12 deadline for them to oppose the disclosure on  
13 Mr. Hirata's declaration on the 29th. Perhaps we  
14 should -- just to get deadlines out there -- give  
15 ourselves a deadline of -- give me a deadline of the  
16 29th to move for disclosure under the grand jury so  
17 we're moving this process along. Does that make sense?

18 THE COURT: I agree with that. I mean I  
19 don't -- we obviously don't want to delay this  
20 litigation longer than necessary, but there's not --  
21 it's not critical that we do this on such a schedule  
22 that both sides don't have full opportunity to fairly  
23 argue their positions, and so we should set the schedule  
24 with that in mind. So if that schedule works for you,  
25 Mr. Washburn, let's make that the schedule.

1 MR. WASHBURN: It does, Your Honor.

2 Your Honor, I would also note one other  
3 issue, and I apologize if the court had something  
4 that --

5 THE COURT: No.

6 MR. WASHBURN: One other issue that comes up  
7 is there is one specific instance of a matter occurring  
8 before the grand jury material that the court had raised  
9 in its order of November 16th, whether it ought to be  
10 made part of the public record, and that -- I assume  
11 that Mr. Bennett will be talking about this on the  
12 December 29th, but I just wanted to flag that the  
13 declaration at issue goes in pretty great detail --  
14 well, not in great detail, but into some detail, and our  
15 response to it goes into rather more detail into some  
16 matters occurring before the grant jury there. So that  
17 will probably be a different cutout of matters occurring  
18 before the grand jury, specifically the testimony of the  
19 accountant than the rest of this that we're  
20 contemplating right now.

21 MR. BENNETT: That's a good point,  
22 Mr. Washburn, because some of those matters that  
23 occurred before the grand jury had been disclosed  
24 pursuant to the Jencks Act. So what we're talking about  
25 is those that haven't been disclosed yet because there



1 wasn't a Jencks Act obligation to disclose those.

2 THE COURT: All right. So does that take  
3 care of the issues we need to address before we move  
4 forward?

5 MR. WASHBURN: I think so. I just want to  
6 make sure I understood. Mr. Bennett -- so the 29th  
7 would be his response as to Mr. Hirata's declaration,  
8 would be our response to -- you know, requesting the  
9 disclosure to us of materials -- of grand jury materials  
10 produced. And then I didn't get down in my notes, so I  
11 apologize, the date when they plan to file their  
12 substantive response on the Hyde Amendment.

13 THE COURT: I think January 31st.

14 MR. BENNETT: Correct.

15 MR. WASHBURN: Perfect.

16 THE COURT: Your response would be due the  
17 end of February, February 28th. Do you have all of  
18 those dates, Tracy?

19 THE CLERK: I do.

20 THE COURT: Okay.

21 Anything else we should discuss today before  
22 we recess?

23 MR. WASHBURN: Just briefly, Your Honor, our  
24 schedule doesn't contemplate it, and I know the United  
25 States will probably take a position related to this,

1 but I suppose what we do then is figure out whether we  
2 need any sort of evidentiary hearing or any sort of  
3 discovery after that round of briefing. I think that's  
4 what Mr. Bennett had suggested because --

5 THE COURT: My view is that once we get the  
6 briefing, we'll have a discussion about whether we --  
7 how we set the hearings and whether we have an  
8 evidentiary hearing. It may well be with the  
9 declarations and the supporting materials everything's  
10 before the court. If it's not, one or the other side  
11 wants to present materials, we'll consider it at that  
12 point.

13 MR. WASHBURN: Perfect.

14 THE COURT: I mean if that satisfies the  
15 parties, so I think that's how we should proceed.

16 MR. WASHBURN: It does. Thank you, Your  
17 Honor. And nothing else from Mr. Diehl.

18 MR. BENNETT: Nor from the United States.

19 THE COURT: We will be in recess.

20 (Whereupon, the matter was concluded.)

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C E R T I F I C A T E

State of Utah

County of Salt Lake

I, Karen Murakami, a Certified Shorthand Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken before me at the time and place set forth herein and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of December, 2017.

Karen Murakami

Karen Murakami, CSR, RPR